No. 115, Original

IN THE

Supreme Court of the United States

October Term, 1988

STATE OF ARKANSAS,
Plaintiff

v.

STATE OF OKLAHOMA,
Defendant

BRIEF IN RESPONSE TO BRIEF OF STATE OF OKLAHOMA IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT AND TO AMICUS CURIAE BRIEF OF THE UNITED STATES

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ARGUMENT

The thrust of the arguments raised by the State of Oklahoma [hereinafter "Oklahoma"] and the United States [hereinafter "Amicus Curiae"] in their respective briefs before this Court is that the plaintiff's motion for leave to file an original action against Oklahoma should be denied because these parties contend that the plaintiff's case lacks the seriousness and dignity required

by this Court for the exercise of its original jurisdiction, and because these parties contend other fora are available to the plaintiff to litigate the issues raised in its complaint. Neither of these factors supports a denial of the plaintiff's motion for leave to file an original action.

1. Oklahoma and the Amicus Curiae contend that the plaintiff's proposed original action lacks the seriousness and dignity which this Court has required for the exercise of original jurisdiction. (Brief of Oklahoma, at 15, 30-50; Brief of United States, at 11-15). There is no doubt but that this Court has " . . . imposed prudential and equitable limitations upon the exercise of [its] original jurisdiction. . . . " *California v. Texas*, 457 U.S. 164, 168 (1982). There is also no doubt but that this Court has stated in determining the propriety of exercising original jurisdiction in a particular case, the Court will look to the seriousness and dignity of the claims raised. *California v. Texas*, 457 U.S. 164, 168 (1982), citing *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972); *Maryland v. Louisiana*, 451 U.S. 724, 740 (1981), citing *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972); *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972). Oklahoma and the Amicus Curiae have suggested that the plaintiff's claims in this case lack the requisite seriousness and dignity based upon their perception of the merits of the plaintiff's case. However, in determining whether the claims in an original action have the requisite seriousness and dignity for the exercise of original jurisdiction, this Court does not, as suggested, equate the

requirement of a serious and dignified claim with something akin to probable success on the merits for obtaining a temporary restraining order.[1] Plaintiff's complaint presents serious and substantial issues affecting the sovereign rights of the State of Arkansas to control pollution within its borders; to make policy decisions affecting its citizens; and to coordinate orderly growth and development in the state. These claims do not lack the seriousness and dignity for the exercise of this Court's original jurisdiction.[2]

Although the plaintiff's likelihood of success on the merits is not and should not be considered in the granting or denial of the plaintiff's motion for leave to file its complaint, the plaintiff is compelled to respond to the mischaracterization of its claims by Oklahoma and the Amicus Curiae. Arkansas is first seeking a declaratory judgment from this Court that Oklahoma's Water Quality Standards, enacted pursuant to the Clean

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[1] See e.g. Georgia v. Pennsylvania Railroad Co., 324 U.S. 439, 463 (1945) (" . . . We are dealing with the case only in a preliminary manner. Cf. Missouri v. Illinois, 200 U.S. 496, 517, 518. The complaint may have to be amplified and clarified as respects the coercion and discrimination charged, the damage suffered, or otherwise. We do not test it against the various types of motions and pleadings which may be filed. We construe it with that liberality accorded the complaint of a sovereign State as presenting a substantial question with sufficient clarity and specificity as to require a joinder of issues. . . .")

[2] The Court's requirement that a state's claim be of a serious and dignified nature is most clearly not met when a state requests the Court to exercise its original and exclusive jurisdiction over issues that perhaps have no place in this Court or any other. See California v. West Virginia, 454 U.S. 1027 (1981) (original and exclusive jurisdiction of Court invoked by West Virginia arising out of an alleged breach of contract covering athletic contests between two state universities) (Dissent, J. Stevens).

Water Act (33 U.S.C. section 1251 et seq.), cannot be controlling for point source dischargers in Arkansas. (Complaint, at 4, 6). Oklahoma contends that it is "clearly" authorized to apply its Water Quality Standards to discharges that originate in Arkansas, and that the Clean Water Act "clearly" requires the source state, Arkansas, and the EPA to issue NPDES permits that comply with Oklahoma's Water Quality Standards as well as Arkansas'. (Brief of State of Oklahoma, at 34-42). Similarly, the Amicus suggests there is no merit to the plaintiff's claim that a downstream state cannot **force** an upstream state to comply with its water quality standards because it argues that sections 301, 401, and 402 of the Clean Water Act [33 U.S.C. sections 1311(b)(1)(C), 1342(b)(1)(A) and 1342(b)(5)] " . . . nowhere suggest[] that only the water quality standards of the source State are relevant to the NPDES permit." (Brief of the United States, at 12).

Arkansas does not contend that the water quality standards of a downstream state are never relevant when a permit is issued in an upstream state. Rather, there is no authority in the Clean Water Act for a downstream state, such as Oklahoma, to block the issuance of permits in upstream states, such as Arkansas, because the downstream state has different or more stringent standards than the upstream state. While a cursory reading of the briefs of Oklahoma and the Amicus makes it appear that Arkansas' argument is completely unsupported by legal authority, that is simply not the

case. Nowhere in the Clean Water Act does it explicitly say that an NPDES permit issued in or by an upstream state must comply with the water quality standards of every downstream state.[3]

When Arkansas contends that the Clean Water Act does not authorize a downstream, affected state to have a veto power over upstream state permits, it additionally relies upon a previous decision by this Court and by an amicus curiae brief filed by the United States in that case. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), this Court stated:

> . . . Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. . . . Significantly, however, an affected State does not have the

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[3] 33 U.S.C. section 1311(b)(1)(C) only provides a timetable for states to establish regulations containing more stringent limitations for that state's discharges pursuant to 33 U.S.C. section 1370. Under 33 U.S.C. section 1341(a)(2), if an affected state is notified of possible effects upon its water quality and chooses to have a public hearing pursuant to that section, the permitting agency must look at the recommendations of the affected state and " . . . shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. . . . " The statute itself does not define whose standards are the "applicable water quality requirements," those of the source state or those of the affected state, and the legislative history of this section is devoid of any discussion of the role an affected state's water quality standards should play in the NPDES permitting process in the source state. 33 U.S.C. section 1342 only requires that states to which the permitting process has been delegated have the ability to notify affected states before a permit is issued, and consider any recommendations that an affected state may offer in regard to a proposed permit. Nowhere in section 1342 did Congress say that a source state would have to accept the recommendations of the affected state or force permittees in the source state to comply with an affected state's water quality standards.

authority to block the issuance of the permit if it is dissatisfied with the proposed standards.

International Paper Co. v. Ouellette, 479 U.S. 481, 490 (1987).[4]

Based upon this Court's statements and reasoning in *Ouellette*, Arkansas argues in this original action that an affected state has no right under the Clean Water Act to bar or condition NPDES permits for Arkansas dischargers, but occupies only an advisory role in the permitting process for other states. As this Court correctly noted in *Ouellette* in relation to common law nuisance suits, to hold otherwise would be to subject a point source on the Mississippi River in Minnesota to the water quality standards of the nine states downstream of the source. *Ouellette* at 481, n.17. Such a chaotic result was never envisioned by Congress in enacting the Clean Water Act.

In addition to this Court's statements in *Ouellette*, the State of Arkansas also relies upon the amicus curiae brief of the United States in the *Ouellette* case as support for its position that affected states such as Oklahoma are

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[4] See also, Ouellette at 495 and n.15; Champion International Corp. v. EPA, 652 F. Supp. 1398, 1399-1400) (W.D. N.C. 1987), judgment vacated by 850 F.2d 182 (4th Cir. 1988).

mere advisors under the Clean Water Act. In that brief, the United States argued that:

> . . . Congress, moreover, deliberately chose to assign a pre-eminent position to the source state in the interstate pollution context, conferring upon the affected neighboring state only an advisory role in the formulation of applicable effluent standards of limitations.25 The affected state may try to persuade the federal government or the source state to increase effluent requirements, but ultimately possesses no statutory authority to compel that result, even when its waters are adversely affected by out-of-state pollution.
>
> 25 To be sure, the Clean Water Act provides both citizens and the governor of an affected state with specific enforcement authority, but those suits are limited to enforcement of the effluent limitations and standards established by the Act, which as described, are determined by the EPA and supplemented only by the source state. . . .

Brief for the United States as Amicus Curiae Supporting Affirmance, 17, and n. 25, *International Paper Co. v. Ouellette*, 107 S.Ct. 805 (1987), Lodging of the State of

Arkansas, Exhibit 1.

When the United States has gone on record espousing the same reasoning cited with approval by this Court in a case in this Court, it can hardly be suggested that the plaintiff's claim that Oklahoma cannot force Arkansas dischargers to comply with Oklahoma Water Quality Standards is unmeritorious.[5]

2. Oklahoma and the Amicus have also urged denial of the plaintiff's motion because they argue that the plaintiff can avail itself of other fora in which its claims may be adjudicated. Oklahoma and the Amicus reason that the plaintiff's complaint should be denied because Arkansas has a sufficient forum in the City of Fayetteville, Arkansas' pending case before the Administrator of the EPA, and for the same reasons that Oklahoma's motion for leave to file a complaint was denied in original action No. 93 before this Court in 1981. (Brief of the State of Oklahoma, at 15-30; Brief of the United States, at 7-10).

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[5] Both Oklahoma and the Amicus have likewise denigrated the plaintiff's Commerce Cause claims as lacking all merit. (Brief of the State of Oklahoma, 30-43; Brief of the United States, 15). The State of Oklahoma correctly notes that where Congress so chooses, it can authorize States to regulate and even interfere with or impede commerce among the States. Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159, 174 (1985). However, it is clear that only " . . . state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." Id. (emphasis added). Congress must specifically authorize and direct the States to take action which interferes with interstate commerce for any such action upon the part of the States to be permissible under the dormant Commerce Clause. See, White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 213 (1983). As was noted above, the Clean Water Act does not plainly or specifically authorize downstream states to apply or enforce their water quality standards in upstream states. At most, the Clean Water Act permits downstream, affected states to be advisors in the NPDES process, with no power to block upstream state permits through the imposition of different water quality standards than those in effect in the source state.

It should initially be noted that this case between two sovereign states falls squarely within the provisions of Article III, section 2, clause 2 of the Constitution and 28 U.S.C. section 1251(a) as a controversy between two states over which this Court has original and exclusive jurisdiction. Thus, Arkansas' case is distinguishable from many of the cases cited by Oklahoma and the Amicus in which this Court declined to exercise original jurisdiction.[6]

Furthermore, when this Court examines the availability of another forum as a factor militating against the exercise of original jurisdiction, the determination " . . . necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. Milwaukee,* 406 U.S. at 93. In this case, there simply is no other forum where these three requirements can be adequately met for the plaintiff.

First, there is no other forum where there is jurisdiction over the State of Arkansas and the State of Oklahoma, the named parties in this action. Arkansas

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[6] See e.g. United States v. Nevada, 412 U.S. 534, 537-540 (1973) (motion for leave to file complaint denied where dispute was between United States and two states under 28 U.S.C. section 1251(b)(2), which would be within jurisdiction of federal district court); Illinois v. Milwaukee, 406 U.S. 91, 97-101 (1972) (political subdivisions are not states under 28 U.S.C. section 1251(a)(1), so jurisdiction is permissive not mandatory under 28 U.S.C. section 1251(b)(3); federal district court would have jurisdiction under 28 U.S.C. section 1331(a) to provide relief to abate nuisance); Washington v. General Motors Corp., 406 U.S. 109 (1972) (federal district court would have jurisdiction over claim of state against citizen of other state under 28 U.S.C. section 1332).

and Oklahoma as states are not bound by the outcome of any administrative or judicial proceeding to which they are not parties.[7] Moreover, Arkansas' claims in this case against another state could not be brought in a federal district court, as was proper in *Illinois v. Milwaukee* or *Oklahoma v. Arkansas.*[8]

Second, there is no other forum where the issues raised in this case may be litigated. Although the question of whether a downstream state can impose its water quality standards on an upstream state discharger can be litigated in NPDES administrative proceedings by an individual discharger, any such determination would only be binding upon the parties to that administrative proceeding, thus requiring other municipal and industrial dischargers in Arkansas to relitigate the issue in a piecemeal fashion.[9] Furthermore, the constitutional

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[7] Oklahoma contends that the States of Arkansas and Oklahoma are parties to the City of Fayetteville's administrative proceeding before the EPA. While the Attorneys General of the respective states do represent subdivisions of the states in that proceeding, the states, per se, are not named parties to that proceeding. Furthermore, Arkansas, as a named party to this proceeding, represents a broader spectrum of entities and interests in this action in its parens patriae role than when the Attorney General of the State represents a department of the State.

[8] Oklahoma v. Arkansas et al., No. 93, Original (1981 Term), was an inappropriate case over which to exercise original jurisdiction for the same reason present in Illinois v. Milwaukee, 406 U.S. 91, 97-101: The State of Oklahoma could have pursued its claims against the Arkansas cities and industries named as defendants in that case in federal district court under 28 U.S.C. section 1331(a) and 1332, respectively, without resort to the original jurisdiction of this Court. Cf. Brief of the United States as Amicus Curiae, at 16, n.19, Oklahoma v. Arkansas, No. 93, Original (1981 Term).

[9] Although the United States suggests that the plaintiff's case may not be ripe because only one Arkansas discharger, the City of Fayetteville, currently faces a challenge to its NPDES permit as violative of Oklahoma's Water Quality Standards, other cities and industries in Arkansas in addition to the City of Fayetteville are also being forced to litigate the issue of whether a downstream state can impose its

issues raised by Arkansas in this action could not be properly raised or decided in EPA administrative proceedings. Although those constitutional issues might be raised by the City of Fayetteville on appeal of its case to the Eighth Circuit Court of Appeals pursuant to 33 U.S.C. section 1369(b)(1)(F), there is simply no provision for the Court of Appeals to engage in any sort of fact finding as would be required to properly adjudicate the claims.

Finally, there is no other forum where the State of Arkansas can obtain the complete relief it seeks from this Court. In no other forum will Arkansas be able to obtain a ruling that will bind the states to this action. In no other forum will Arkansas be able to adequately protect the other interests it seeks to represent in the instant action in its parens patriae capacity. There is simply no other judicial forum in which Arkansas can avoid what can only be described as a range war with a sister state.

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water quality standards on an upstream state discharger. The City of Fort Smith, Arkansas, has joined as an intervenor in an action brought by the Oklahoma Attorney General on behalf of the State of Oklahoma, the Oklahoma Wildlife Conservation Commission, and the Oklahoma Water Resources Board against the United States Corps of Engineers. The Oklahoma Attorney General in that action is contending that a permit issued to Fort Smith for the impoundment of a stream should not have been issued because it would violate Oklahoma's Water Quality Standards. State of Oklahoma, et al. v. United States Corps of Engineers, et al., Lodging of the State of Arkansas, Exhibit 2. In addition, the State of Oklahoma is currently challenging a proposed NPDES permit for the City of Prairie Grove, Arkansas, which discharges into a tributary of the Illinois River in Arkansas, on the grounds that it may violate Oklahoma's Water Quality Standards. Request of State of Oklahoma for Public Hearing and Comments to City of Prairie Grove, Arkansas, Draft NPDES Permit No. AR0022098. Lodging of the State of Arkansas, Exhibit 3.

Oklahoma and the Amicus also simplistically assert that Arkansas' motion for leave to file its complaint in this case must be denied for the same reasons urged in *Oklahoma v. Arkansas, et al.*, No. 93, Original (1981 Term). What Oklahoma and the Amicus omit to inform the Court is that the State of Arkansas and the other defendants in original action 93 urged denial of Oklahoma's motion for leave to file a complaint primarily because Oklahoma apparently didn't realize that its complaint, premised upon federal common law, failed to state a claim upon which relief could be granted. This Court had specifically declared federal common law to abate a water pollution nuisance unavailable in *Milwaukee v. Illinois*, 451 U.S. 304 (1981) and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), both decided only months before Oklahoma filed its motion.[10] Premised as it was upon a cause of action that no longer existed, Oklahoma's complaint in that case truly did lack the seriousness and dignity which this Court requires for the exercise of original jurisdiction.

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[10] State of Arkansas' Brief in Opposition to Motion for Leave to File Complaint at 5-9, State of Oklahoma v. State of Arkansas, et al., No. 93, Original (1981 Term). Perhaps more importantly, however, Oklahoma's complaint did not merit this Court's jurisdiction because it could have been pursued in federal district court against the cities and industries named as defendants in that case. See supra note 8 and accompanying text.

CONCLUSION

Arkansas' motion for leave to file a complaint should be granted.

Respectfully submitted.

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